

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29/03/2004

CORAM

THE HON'BLE MR.JUSTICE M. CHOCKALINGAM

SECOND APPEAL NO.1273 OF 1993

1. Vellammal
2. Papathi
3. Kannammal
4. Veerasangili
5. Ganapathy Konar
6. Jayalakshmi
7. Jayadevi
8. Devi (minor)
9. Ganesan
10. Karuppan
(Appellants 6 to 8 are rep.
by Power of Attorney agent
fifth appellant herein) .. Appellants

-Vs-

Minor Ramalakshmi
rep by mother and guardian
Subbalakshmi alias Valliammal .. Respondent

This second appeal is preferred under Section 100 of CPC against the judgment and decree of the learned District Judge, Chidambaranar District, Tuticorin passed in AS No.36 of 1992 dated 9.7.1993 modifying the judgment and decree on the file of the learned Subordinate Judge, Tuticorin passed in OS No.100 of 1984 dated 12.8.1991.

!For Appellants : Mr.K.Srinivasan

^For Respondent : Mr.P.Rathinadurai

:JUDGMENT

Aggrieved over the judgment of the learned District Judge, Tuticorin made in AS No.36 of 1992 wherein the judgment of the trial Court, namely, the Subordinate Judge, Tuticorin, in a suit for partition was affirmed, the defendants 1,6, 7, 9, 10 and 13 to 17 have brought forth this second appeal.
2. Minor plaintiff sought for division asking for 1/3rd share in the property of one Kanniahdas alleging that the said Kanniahdas married her

mother Subbalakshmi as his second wife; that the said Kanniahdas died on 28.1.1984 leaving behind him his first wife, the first defendant and the plaintiff's mother, the second defendant; that the said Kanniahdas did not make any arrangement regarding the property; that by operation of law, she was entitled to 1/3rd share.

3. The suit was resisted by the defendants stating that the alleged marriage between Kanniahdas and the mother of the plaintiff was a false one and the plaintiff was not born to the said Subbalakshmi through Kanniahdas, and hence, she was not entitled to any share by operation of law.

4. The trial court framed necessary issues, tried the suit and decreed the same granting 1/6th share in all the schedule mentioned properties except 4th item of B schedule. An appeal was preferred by the aggrieved defendants and the same was dismissed. Hence, this second appeal has been brought forth challenging the judgment of courts below.

5. At the time of admission, the following substantial questions of law were formulated by this Court for consideration:

1) Whether the finding of the courts below are vitiated by its failure to draw the legal inferences on the proved and admitted facts set out in the grounds as regards the factum of second marriage between Kanniah das and Subbalakshmi?

2) Whether the courts below is right in granting a decree by virtue of Section 16 of the Hindu Marriage Act in the absence of the factum of marriage not established beyond the suspicious circumstances?

3) Whether the findings of the courts below are vitiated by its erroneous approach relying upon the birth extract which is inadmissible in evidence and the statements made before the Criminal court under Exhibits A-9 to A-11 which are inadmissible in evidence before the Civil Court?

6. This court has paid its full attention of the submissions made by the learned counsel for the appellants and also the learned counsel for the respondent on those contentions.

7. The plaintiff sought the relief of partition in respect of her 1/3rd share in the property of one Kanniahdas alleging that she is the daughter of the said Kanniahdas through his second wife. The same was resisted by the defendants inter-alia stating that there was no marriage between the said Kanniahdas and Subbalakshmi, the mother of the minor plaintiff and that she is not entitled to partition.

8. Both the courts below have discussed the evidence, in extenso and have recorded a concurrent finding that there was a marriage between the said Subbalakshmi, the mother of the minor plaintiff and the said Kanniahdas, but the marriage is void in view of the subsistence of the marriage between the said Kanniahdas and the first defendant and though the plaintiff was an illegitimate child, she was entitled to her share in view of the fact that the property belonged to the joint family of the said Kanniahdas and his father and Kanniahdas was entitled to half share and in that half share minor plaintiff was entitled to 1/3rd share and in that way, the plaintiff was entitled to 1/6th share in the entire property, except the 4th item in the B schedule in respect of which, the plaintiff did not press her relief.

9. Advancing his arguments, the learned counsel for the appellants would submit that both the courts below have found that the property what was available for division was the ancestral property and not that of Kanniahdas and the property continued to be joint even at the time when the partition was

sought for. In view of Section 16(3) of the Hindu Marriage Act, the minor plaintiff could be treated as legitimate, though illegitimate for the purpose of succession or inheritance which can only be confined to an extent of the property of Kanniahdas and not in respect of the joint family property available. In support of his contention, the learned counsel relied on the following decisions :

- 1) 1989-LW-Mad.706 (SIVAGNANAVADIVU NACHIAR & OTHERS VS. KRISHNAKANTHAN AND OTHERS)
- 2) 1996(2) MLJ (SC) 82 (SMT. PARAYANKANDIYAL ERAVATH KANAPRAVA KALLIANI AMMA AND OTHERS VS. K. DEVI AND OTHERS)
- 3) 2003 (1) CTC 250 (JINIA KEOTIN & ORS. VS. KUMAR SITARAM MANJHI & ORS.)
- 4) 2003(3) LW 621 (RANGASAMI VS. KASIAPPA GOUNDER AND TWO OTHERS)

10. In answer to the above contentions, the learned counsel for the respondent would submit that on the day when partition was sought for by the plaintiff, the said Kanniahdas was entitled to half share in the property. The application was confined only to the succession or inheritance in the property of the parents only. In the instant case, Kanniahdas was entitled to half share in the property. The learned counsel would further add that nowhere it was found in the provisions of Section 16(3) of the Act that the children though illegitimate, they can be treated as legitimate in view of the application of Section 16 of the Act and they can have the remedy only in respect of the self acquisition, and hence, the contention of the appellants' side have got to be rejected. Added further the learned counsel that the first defendant has filed a suit against the said Kanniahdas in OS No.5 of 1983 before the District Munsif, Srivaikundam alleging that the property in respect of which she proceeded was shown therein and she has characterised that all the properties belonged to Kanniahdas.

11. After careful consideration of the positions, both factual and legal, this Court is of the considered opinion that though attractive the contention put forth by the appellants' side may be, it would not stand the scrutiny of law. The prime contention now put forth in this Court is that the property in respect of which partition sought for by the minor plaintiff belonged to the joint family of Kanniahdas and his father and the property continued to be joint on the death of Kanniahdas and the minor plaintiff, though illegitimate because of the void marriage, has to be treated as legitimate by application of Section 16 of the Act and the application has got to be confined only to an extent of succession or inheritance to the properties of the said Kanniahdas, but in the instant case, the properties were ancestral, and hence, the claim has got to be rejected. This contention cannot be countenanced for more reason than one. From the very averment in the plaint, it would be abundantly clear that the plaintiff sought for the relief of division of 1/3rd share alleging that the properties mentioned in the schedule belonged to her father Kanniahdas; that the first defendant is the first wife and the second defendant, who is the mother were entitled to 2/3rd share and the minor plaintiff was entitled to 1/3rd share. Nowhere has she whispered that the properties in question were joint or ancestral.

12. A reading of the written statement would make it clear that the properties were originally enjoyed by the said Kanniahdas and his mother the second defendant and on his death, they were jointly enjoyed by the first defendant and the second defendant. Nowhere it is averred in the written

statement that the properties were the ancestral or joint family property. It is pertinent to point out that there was a suit filed by the first defendant seeking for the relief in OS No.504 of 1983 and the copy of which was marked as Ex.A.1 where the identical properties were shown as the properties of Kanniahdas and not mentioned as ancestral property, and thus, from the available materials, nothing is available to hold that the properties were ancestral properties, but the properties were left by Kanniahdas as the properties of his own. There cannot be any quarrel that by operation of law under Section 16 of the Act that the children though illegitimate had to be treated as legitimate notwithstanding that the marriage between their parents was void or voidable for the purpose of succession or inheritance and that which is available only to the property of the parents only. In the instant case, partition was sought for only in respect of the properties of Kanniahdas what was available in the hands of the defendants at the time when the partition was sought for. Therefore, there cannot be any legal impediment for the grant of relief in view of Section 16 of the Act. It is not the case where any attempt was made by demanding division of the property, which were ancestral or joint, but the properties of the Kanniahdas in the hands of the defendants at the time when the relief was sought for, and hence, both the courts below were perfectly correct in granting the relief to the plaintiff. The judgment of both the courts below do not require for any interference. 13. In the result, this second appeal fails and the same is dismissed, leaving the parties to bear their costs.

Index : Yes

Internet : Yes

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To

1. The District Judge, Tuticorin.
2. The Subordinate Judge, Tuticorin.
3. The Record Keeper, VR Section,
High Court, Madras

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